

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Submitted on Briefs, October 5, 2006

**NATHANIEL ANTON FLOWERS and wife, CARMEN FLOWERS v.
STATE OF TENNESSEE**

**Direct Appeal from the Tennessee Claims Commission, Davidson County
No. 20301616 Hon. Vance Cheek, Judge**

No. E2006-00580-COA-R3-CV - FILED NOVEMBER 6, 2006

The Commissioner granted defendants summary judgment on a medical malpractice claim. On appeal, we dismiss the case on the failure of plaintiffs to timely file notice of appeal.

Tenn. R. App. P.3 Appeal as of Right; Appeal Dismissed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Thomas C. Jessee, Johnson City, Tennessee, for appellants.

Paul G. Summers, Attorney General, Michael E. Moore, Solicitor General, and Sarah F. Henry, Assistant Attorney General, Nashville, Tennessee, for appellee.

OPINION

This action originated in the Claims Commission against the State of Tennessee and Bristol Family Practice a/k/a ETSU Family Physicians of Bristol, alleging medical malpractice by an employee of the defendants.

The State filed a Motion for Summary Judgment supported by expert opinion affidavits that the doctor who treated plaintiff did not deviate from the standard of care. The Commissioner entered an Order granting the State summary judgment, finding that the doctor had testified in his affidavit that he complied with the Tennessee standard of care in his treatment of plaintiff, and that plaintiff failed to provide any expert's affidavit to rebut that testimony.

Plaintiff has appealed raising the issues of whether the Commissioner erred in granting summary judgment, and the State raised the issue of whether the appeal was timely?

On appeal, plaintiffs admit that they did not have an expert who could refute Townsend's testimony that he complied with the standard of care, but assert there are genuine issues because Townsend made admissions to plaintiffs that he was negligent.

The record before us does not support this assertion. The doctor's affidavit stated that he had fully complied with the standard of care in his treatment of plaintiff, which is sufficient to shift the burden to plaintiffs to provide expert testimony to support their claims in order to avoid summary judgment. *See Fitts v. Arms*, 133 S.W.3d 187 (Tenn. Ct. App. 2003). In any event, the dispositive issue is whether the appeal was timely perfected.

Tennessee Rules of Civil Procedure 3(e) requires that notice of appeal as of right to the Court of Appeals be perfected by timely filing a notice of appeal with the Clerk of the Trial Court, as provided in Rule 4. In this case, plaintiffs filed a notice of appeal with the Division of Claims Administration on August 18, 2005. This notice was not filed with the Clerk of the Claims Commission's office until March 13, 2006. The mistake was not discovered until the notice of appeal was transmitted to the Claims Commission in March of 2006. The notice was not timely filed in accordance with the Tennessee Rules of Appellate Procedure, and we dismiss the appeal on this ground.

The cost of the appeal is assessed to Nathaniel and Carmen Flowers.

HERSCHEL PICKENS FRANKS, P.J.